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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

DOMINIC GEORGEPOLOUS,

Defendant and Appellant.

D060913

(Super. Ct. No. SCN291002)

APPEAL from a judgment of the Superior Court of San Diego County, Aaron H. Katz, Judge. Affirmed as modified.

A jury convicted Dominic Georgepolous of burglary (Pen. Code,¹ § 459) and possession of a forged item (§ 475, subd. (a)). The court thereafter found six prison priors to be true. (§ 667.5, subd. (b).)

Appellant was sentenced to a split term of four years in county jail plus four years mandatory supervision upon release. Appellant was awarded 173 actual days of custody

¹ All further statutory references are to the Penal Code unless otherwise specified.

credits plus 86 days of credits pursuant to section 4019. The court also imposed a \$3,200 restitution fine (§ 1202.4, subd. (b)).

Georgepolous appeals contending he is entitled to additional section 4019 credits and that the court erred in ordering a \$3,200 restitution fine. As to the latter issue appellant recognizes he did not oppose the amount of the fine in the trial court and that it is likely the issue will be deemed forfeited on appeal. He therefore argues his trial counsel was ineffective for failing to object to the amount of the fine.²

The People have responded and have correctly conceded that since appellant was sentenced under the realignment statute, to impose a lesser amount of custody credits based upon an earlier statute would amount to an increase in penalty in violation of the ex post facto limitation of the federal Constitution. (*Weaver v. Graham* (1981) 450 U.S. 24.) Accordingly, the People concede that appellant is entitled to an additional 87 days of section 4019 credits. We will order the judgment modified accordingly. Regarding the restitution fine, we will find the issue forfeited by failure to raise it in the trial court. We will also find there is nothing in this record on which we could base a reasonable analysis of the ineffective assistance of counsel claim. Any remedy that might be available to appellant must be separately pursued by a petition for writ of habeas corpus filed in the trial court.³

² It appears from the record that appellant's correct name is Dominic Georgepolous. However, in the trial court he was addressed by his alias, Dominic Guest.

³ Since appellant does not challenge either the admissibility or the sufficiency of the evidence to support his convictions we will omit the traditional statement of facts.

DISCUSSION

Appellant contends the trial court erred in imposing a restitution fine in the amount of \$3,200. He argues there is no basis for calculating the fine in that amount and in any event the trial court abused its discretion in setting the amount that high.

Appellant acknowledges that he did not raise these issues in the trial court, even though the amount of the fine was first recommended in the probation officer's report. Appellant further contends that if the issues are forfeited, his counsel was ineffective.

A. The Issues Regarding the Restitution Fine Have Been Waived

Trial courts enjoy broad discretion to set the amount of a restitution fine " 'commensurate with the seriousness of the offense.' " (*People v. Urbano* (2005) 128 Cal.App.4th 396, 405.) We will not overturn a decision of the trial court in setting the amount of the fine unless there is a clear showing of an abuse of discretion. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124.)

In order for an appellate court to make a determination of whether the trial court abused its discretion in calculating the amount of a restitution fine, there must be a record that demonstrates the trial court's decisionmaking process in reaching its conclusion. In cases such as this, where the issue was not raised in the trial court, we are left without any ability to evaluate the trial court's decision. Even where there is a claim of insufficient evidence to support the calculation, such issue is deemed waived if not presented in the trial court. (*People v. Nelson* (2011) 51 Cal.4th 198, 227.)

The imposition of a fine is essentially a sentencing decision and objections to the trial court's discretionary choices must be raised in the trial court or they will be deemed waived on appeal. (*People v. Bonilla* (2007) 41 Cal.4th 313, 336.)

In the present case, where the defense had notice of the probation officer's recommendation and where the trial court imposed a fine substantially less than the maximum provided by statute, the failure to raise the issue in the trial court has left us without a record on which to make a reasoned evaluation of that decision. Accordingly we treat these issues as forfeited and decline to further address them on this appeal.

B. Ineffective Assistance of Counsel

Appellant contends his counsel was ineffective for failing to object to the amount of the restitution fine. We find the current record does not support that claim.

Where a defendant seeks to avoid the consequences of a criminal case based on a claim that counsel did not provide effective assistance as required by the Sixth Amendment, the defendant must prove that counsel performed below the standard of care and that in the absence of the error it is likely a different result would have occurred. (*Strickland v. Washington* (1984) 466 U.S. 668, 694; *People v. Holt* (1997) 15 Cal.4th 619, 703.) Appellant has failed to meet his burden on both grounds.

First, in the absence of a record, we have no idea why counsel did not object. Thus we are left to speculate as to why counsel made his choice. We note from the record defense counsel vigorously attempted to persuade the court to impose less time in custody than requested by the probation officer. Whether counsel made a tactical choice of where to focus his arguments cannot be determined in the absence of a record. As our

Supreme Court has advised it is often impossible on appeal to determine if counsel was ineffective for failing to act based on an appellate record. In such cases, the defendant's remedy, if any, is by way of a petition for writ of habeas corpus filed in the trial court. (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 267-268.)

Finally, since no objection was made and we have no idea why it was not made, we are also unable to determine whether if an objection had been made, a different result would have been likely. Instead, we are left to speculate as to the effect an objection might have had on the trial court or on our review on appeal. Accordingly, we find appellant has not shown that his trial counsel was ineffective.

DISPOSITION

The judgment is modified to provide appellant with an additional 87 days of section 4019 credits. In all other respects the judgment is affirmed.

HUFFMAN, Acting P. J.

WE CONCUR:

HALLER, J.

O'ROURKE, J.